A

Granstep Development Sdn Bhd v Tan Chong Heng Construction Sdn Bhd and other appeals

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(C)(A)-1597–08 OF 2021, B-02(C)(A)-1598–08 OF 2021 AND B-02(C)(A)-1599–08 OF 2021

KAMALUDIN MD SAID, NORDIN HASSAN AND AHMAD ZAIDI IBRAHIM JJCA

C

15 APRIL 2024

Building and Construction Law — Adjudication — Adjudication decision — Construction Industry Payment and Adjudication Act 2012 ('CIPAA') Application to set aside decision of adjudicator — Whether there was requirement for claimant to withdraw first adjudication proceedings before commencing second adjudication proceedings — Whether adjudicator for first adjudication proceeding appointed — Whether there was absence of adjudicator to decide on cost for withdrawal — Whether there was breach of natural justice

D

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Building and Construction Law — Adjudication — Stay — Application for stay of enforcement of adjudication decision — Whether there was error on part of adjudicator in proceeding and determining second adjudication proceedings prior to withdrawal of first adjudication proceedings — Whether requirements under s 28 of CIPPA established

F

The appellant ('Granstep') appointed the respondent ('Tan Chong') as its contractor for a housing project but later terminated the contract/agreement. As a result, Tan Chong submitted its payment claim ('PC') and as the architect did not issue any interim payment certificate, Tan Chong then served its PC on Granstep ('first PC') under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') and, accordingly, Granstep served its Payment Response ('PR') on Tan Chong for the 'first PC'. Following this, for the first proceeding, Tan Chong served a notice of adjudication ('first NA') on Granstep and also sent Form 3A, Form 5 and two cheques to the Director of AIAC. The AIAC, however, informed Tan Chong that due to the demise of its Director, an adjudicator would only be appointed for Tan Chong's claim by a new Director. Tan Chong replied to AIAC informing that it wished to proceed with its claim and would file a fresh Form 5. About a month later, for the second proceeding, Tan Chong served a second payment claim ('second PC') on Granstep, informed Granstep that the second PC superseded the first PC and claimed for the sum of RM4.125m. Granstep disputed Tan Chong's claim and at the same time counterclaimed for the sum of RM14.558m, against Tan

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Chong vide another PR ('second PR'). Tan Chong again issued another notice of adjudication ('second NA') on Granstep, informing Granstep that the second NA superseded the first NA. Following this, Tan Chong sent to AIAC's Director Form 3A ('second Form 3A'), Form 5 ('second Form 5') and two cheques being the registration fee and appointment fee after which the AIAC's Director appointed an adjudicator to adjudicate the second PC. Granstep objected against the adjudicator to arbitrate for want of jurisdiction, but the adjudicator dismissed Granstep's objection and proceeded to adjudicate Tan Chong's claim and proceeded to deliver the adjudication award ('AD') whereby, Tan Chong's claim was allowed in the sum of RM2,104,964.44 and Granstep's counter claim was dismissed. Flowing from the AD, three separate applications were filed in the High Court vide three separate originating summons ('OS') namely: (a) OS to set aside the AD under s 15 of the CIPAA filed by Granstep (OS No 11 to set aside); (b) OS for stay of enforcement of AD pending arbitration between the parties pursuant to ss 16 and 27 of the CIPAA 2012 filed by Granstep (OS No 12 for stay); and (c) OS to enforce the AD under s 24 of the CIPAA filed by Tan Chong (OS No 13 for enforcement). After hearing all the OS, the High Court judge: (i) dismissed OS No 11 to set aside and OS No 12 for stay; and (ii) allowed OS No 13 for enforcement. Dissatisfied, Granstep appealed against the decision of the High Court vide three separate appeals namely: (A) Appeal No 1597–08 of 2021 (Appeal 1579) for OS No 11 to set aside; (B) Appeal No 1598–08 of 2021 (Appeal 1598) for OS No 12 for stay; and (C) Appeal No 1599–08 of 2021 (Appeal 1599) for OS No 13 for enforcement. Granstep, inter alia, submitted that since: (1) Tan Chong had not withdrawn the first adjudication proceedings pursuant to s 17(1) of the CIPAA; (2) the second adjudication had not been registered by the AIAC under r 2 of the AIAC Adjudication Rules and Procedures ('ARP'); and (3) the second PC could not supersede the first PC, the HCJ was in error in not setting aside the AD as the adjudicator had committed a breach of natural justice and/or had exceeded his jurisdiction and/or completely lacked jurisdiction to adjudicate the second PC.

Held, dismissing the appeals:

(1) Nowhere in s 8(1) of the CIPAA states that adjudication proceedings shall commence merely upon the service of a NA by a claimant on the respondent (without the appointment of an adjudicator). Hence, when an adjudicator had not been appointed, an adjudication had not been instituted, notwithstanding that the claimant's PC (on the respondent) and NA (on AIAC and the respondent) had been served. Consequently, to describe the first PC, first PR and first NA as the first adjudication was misconceived. No adjudication proceedings had been instituted with regard to the first PC, first PR and first NA (as an adjudicator had not been appointed for the first PC and first NA) (see paras 21–22).

(2) The ARP had no legal effect as it was not a legislation made under CIPAA. The CIPAA did not confer any power on AIAC to make regulations or subsidiary legislation. As such, Granstep could not rely on ARP to challenge the jurisdiction of the adjudicator to hear the arbitration (see para 24).

(3) Based on s 17(1) and (2) of the CIPAA, a claimant could only withdraw the adjudication proceedings after the appointment of an adjudicator by serving a notice of withdrawal in writing on the respondent and the adjudicator. Section 17(2) states that the claimant 'shall' bear the costs arising out of the withdrawal of the adjudication proceedings unless the adjudicator orders otherwise, which implied that the costs for the withdrawal could only be decided by an adjudicator. Accordingly, if an adjudicator had not been appointed, there was no requirement for a claimant to withdraw an adjudication because there was no adjudicator to decide on who should bear the costs for the withdrawal and its amount (para 29).

(4) In dismissing OS No 11 to set aside, the HCJ acknowledged the restrictive provision of s 15 of CIPAA, under which Granstep's application to set aside of the AD was premised on. The adjudication proceedings had not been commenced by way of the first PC and first AC and that Tan Chong was not required by CIPAA, in particular s 17(1) and (2) to withdraw the first adjudication before commencing the second adjudication. Having agreed with the HCJ's reasoning and ruling in respect of Appeal No 1597, Granstep had not been prejudiced in any manner by Tan Chong's non-withdrawal of the first adjudication because as found by the HCJ, Granstep had served the second PR and AR and it bore mention that the adjudicator had dismissed Granstep's first jurisdictional objection. On the foregoing reasons three was no merit in Appeal No 1597. Accordingly, Appeal No 1597 was dismissed (paras 30–32).

(5) The HCJ had after considering the grounds of objection for Appeal No 1599 found them to be devoid of any merit as Granstep's had merely repeated its submission for the setting aside (OS No 11 and Appeal No 1597). Having found Granstep's argument and submission for Appeal 1597 to be without merit, similarly, for Appeal No 1599, was found to be the same. Therefore Appeal No 1599 was also accordingly dismissed (see paras 34–35).

(6) Section 16 of the CIPAA allows some degree of flexibility to the courts to stay an adjudication award where there were clear errors, or to meet justice of the individual case. On the facts of the case, there was no error on the part of the adjudicator in proceeding and thereafter in determining the second adjudication. Tan Chong had established all the requirements under s 28 of the CIPPA and based on enforcement of the

AD was allowed. Granstep failed to show any error on the part of the adjudicator and/or the HCJ. Thus, Granstep's appeal for Appeal No 12, ie Appeal No 1598 was also dismissed (see paras 46–47).

(7) Granstep failed to show that the HCJ was plainly wrong, on the law and the facts in dismissing Granstep's OS No 11 to set aside and also in not granting a stay of enforcement of the same, pending arbitration (OS No 12 for stay). The HCJ was also not plainly wrong in allowing leave to Tan Chong to enforce the AD (OS No 13 for enforcement). Hence, there was no error that warranted appellate intervention (see paras 49–50).

[Bahasa Malaysia summary

Perayu ('Granstep') melantik responden ('Tan Chong') sebagai kontraktornya untuk satu projek perumahan tetapi kemudiannya menamatkan kontrak/perjanjian. Akibatnya, Tan Chong mengemukakan tuntutan pembayarannya ('PC') dan memandangkan arkitek tidak mengeluarkan sebarang sijil pembayaran interim, Tan Chong kemudiannya menyampaikan PCnya kepada Granstep ('PC pertama') di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') dan, selanjutnta, Granstep menyampaikan respons pembayarannya ('PR') kepada Tan Chong bagi 'PC pertama'. Berikutan itu, untuk prosiding pertama, Tan Chong menyampaikan permulaan adjudikasi ('NA pertama') kepada Granstep dan turut menghantar Borang 3A, Borang 5 dan dua cek kepada Pengarah AIAC. AIAC, bagaimanapun, memaklumkan Tan Chong bahawa disebabkan kematian Pengarahnya, seorang adjudikator hanya akan dilantik bagi tuntutan Tan Chong oleh Pengarah baharu. Tan Chong menjawab kepada AIAC memaklumkan bahawa ia ingin meneruskan tuntutannya dan akan memfailkan Borang 5 baharu. Kira-kira sebulan kemudian, untuk prosiding kedua, Tan Chong menyampaikan tuntutan pembayaran kedua ('PC kedua') kepada Granstep, memaklumkan Granstep bahawa PC kedua menggantikan PC pertama dan menuntut sejumlah RM4.125m. Granstep mempertikaikan dakwaan Tan Chong dan pada masa yang sama menuntut balas untuk jumlah RM14.558m, terhadap Tan Chong melalui PR lain ('PR kedua'). Tan Chong sekali lagi mengeluarkan satu lagi permulaan adjudikasi ('NA kedua') kepada Granstep, memaklumkan Granstep bahawa NA kedua menggantikan NA pertama. Berikutan itu, Tan Chong menghantar kepada Pengarah AIAC Borang 3A ('Borang 3A kedua'), Borang 5 ('Borang 5 kedua') dan dua keping cek sebagai fi pendaftaran dan fi pelantikan yang mana selepas itu Pengarah AIAC melantik seorang adjudikator untuk mengadjudikasi PC kedua. Granstep membantah terhadap adjudikator untuk mengadjudikasi kerana kekurangan bidang kuasa, tetapi adjudikator menolak bantahan Granstep dan meneruskan untuk mengadjudikasi tuntutan Tan Chong dan meneruskan untuk menyampaikan awad adjudikasi ('AD') yang mana, tuntutan Tan Chong dibenarkan dalam jumlah RM2,104,964.44 dan tuntutan balas Granstep telah ditolak. Berdasarkan kepada AD, tiga permohonan berasingan

telah difailkan di Mahkamah Tinggi melalui tiga saman pemula berasingan ('OS') iaitu: (a) OS untuk mengetepikan AD di bawah s 15 APAIP yang difailkan oleh Granstep (OS No 11 untuk mengetepikan); (b) OS untuk menggantung penguatkuasaan AD sementara menunggu timbang tara antara pihak-pihak menurut ss 16 dan 27 APAIP 2012 yang difailkan oleh Granstep (OS No 12 untuk penggantungan); dan (c) OS untuk menguatkuasakan AD di bawah s 24 APAIP yang difailkan oleh Tan Chong (OS No 13 untuk penguatkuasaan). Selepas mendengar kesemua OS, hakim Mahkamah Tinggi: (i) menolak OS No 11 untuk mengetepikan dan OS No 12 untuk penggantungan; dan (ii) membenarkan OS No 13 untuk penguatkuasaan. Tidak berpuas hati, Granstep merayu terhadap keputusan Mahkamah Tinggi melalui tiga rayuan berasingan iaitu: (A) Rayuan No 1597–08 tahun 2021 (Rayuan 1579) untuk OS No 11 mengetepikan; (B) Rayuan No 1598–08 tahun 2021 (Rayuan 1598) untuk OS No 12 untuk penggantungan; dan (C) Rayuan No 1599–08 tahun 2021 (Rayuan 1599) untuk OS No 13 untuk penguatkuasaan. Granstep, antara lain, berpendapat oleh kerana: (1) Tan Chong tidak menarik balik prosiding adjudikasi pertama menurut s 17(1) APAIP; (2) adjudikasi kedua belum didaftarkan oleh AIAC di bawah k 2 AIAC Adjudication Rules and Procedures ('ARP'); dan (3) PC kedua tidak boleh menggantikan PC pertama, HCJ telah terkhilaf kerana tidak mengenepikan AD kerana adjudikator telah melakukan pelanggaran keadilan semula jadi dan/atau telah melebihi bidang kuasanya dan/atau kekurangan bidang kuasa sepenuhnya untuk mengadjudikasi PC kedua.

Diputuskan, menolak rayuan:

(1) Tiada mana-mana dalam s 8(1) APAIP menyatakan bahawa prosiding adjudikasi hendaklah dimulakan hanya selepas penyampaian NA oleh pihak yang menuntut kepada responden (tanpa pelantikan adjudikator). Oleh itu, apabila adjudikator belum dilantik, adjudikasi tidak dimulakan, tidak mengambilkira PC pihak menuntut (kepada responden) dan NA (kepada AIAC dan responden) telah disampaikan. Akibatnya, untuk menerangkan PC pertama, PR pertama dan NA pertama sebagai adjudikasi pertama telah disalah anggap. Tiada prosiding adjudikasi telah dimulakan berkenaan dengan PC pertama, PR pertama dan NA pertama (oleh kerana seorang adjudikator belum dilantik untuk PC pertama dan NA pertama) (lihat perenggan 21–22).

(2) ARP tidak mempunyai kesan undang-undang kerana ia bukan perundangan yang dibuat di bawah APAIP. APAIP tidak memberikan sebarang kuasa kepada AIAC untuk membuat peraturan atau perundangan subsidiari. Oleh itu, Granstep tidak boleh bergantung pada ARP untuk membantah bidang kuasa adjudikator untuk mendengar timbang tara (lihat perenggan 24).

(3) Berdasarkan s 17(1) dan (2) APAIP, pihak yang menuntut hanya boleh

menarik balik prosiding adjudikasi selepas pelantikan adjudikator dengan menyampaikan notis penarikan balik secara bertulis kepada responden dan adjudikator. Seksyen 17(2) menyatakan bahawa pihak yang menuntut 'hendaklah' menanggung kos yang timbul daripada penarikan balik prosiding adjudikasi melainkan adjudikator memerintahkan sebaliknya, yang menyatakan secara tidak langsung bahawa kos untuk penarikan itu hanya boleh diputuskan oleh adjudikator. Sehubungan itu, jika seorang adjudikator tidak dilantik, tiada keperluan bagi pihak yang menuntut untuk menarik balik adjudikasi kerana tiada adjudikator untuk memutuskan siapa yang harus menanggung kos penarikan balik dan jumlahnya (perenggan 29).

(4) Dalam menolak OS No 11 untuk mengetepikan, HCJ mengakui peruntukan sekatan s 15 APAIP, di mana permohonan Granstep untuk mengetepikan AD adalah didasarkan. Prosiding adjudikasi belum dimulakan melalui PC pertama dan AC pertama dan bahawa Tan Chong tidak dikehendaki oleh APAIP, khususnya s 17(1) dan (2) untuk menarik balik adjudikasi pertama sebelum memulakan adjudikasi kedua. Bersetuju dengan alasan dan keputusan HCJ berkenaan dengan Rayuan No 1597, Granstep tidak diprejudiskan dalam apa-apa cara sekalipun oleh Tan Chong yang ketidakpenarikan balik adjudikasi pertama kerana seperti yang diputuskan oleh HCJ, Granstep telah menyampaikan PR dan AR kedua dan ia menyebut bahawa adjudikator telah menolak bantahan bidang kuasa pertama Granstep. Atas sebab-sebab di atas ianya tiada merit dalam Rayuan No 1597. Sehubungan itu, Rayuan No 1597 telah ditolak. (perenggan 30–32).

(5) HCJ telah menimbangkan alasan bantahan untuk Rayuan No 1599 mendapati ianya tidak mempunyai sebarang merit kerana Granstep hanya mengulangi penghujahannya untuk mengetepikan (OS No 11 dan Rayuan No 1597). Setelah mendapati hujah dan hujahan Granstep untuk Rayuan 1597 adalah tanpa merit, begitu juga, untuk Rayuan No 1599, diputuskan adalah sama. Oleh itu Rayuan No 1599 juga telah ditolak sewajarnya (lihat perenggan 34–35)

(6) Seksyen 16 APAIP membenarkan beberapa tahap fleksibiliti kepada mahkamah untuk menggantung awad adjudikasi di mana terdapat kekhilafan yang jelas, atau untuk memenuhi keadilan kes individu. Dari segi fakta kes, tiada kekhilafan di pihak adjudikator dalam prosiding dan selepas itu dalam menimbangkan adjudikasi kedua. Tan Chong telah menetapkan semua keperluan di bawah s 28 CIPPA dan berdasarkan penguatkuasaan AD dibenarkan. Granstep gagal menunjukkan sebarang kekhilafan di pihak adjudikator dan/atau HCJ. Oleh itu, rayuan Granstep untuk Rayuan No 12, iaitu Rayuan No 1598 juga telah ditolak (lihat perenggan 46–47).

(7) Granstep gagal untuk menunjukkan bahawa HCJ adalah jelas salah, pada

undang-undang dan fakta dalam menolak OS No 11 Granstep untuk mengenepikan dan juga dalam tidak membenarkan penggantungan penguatkuasaannya, sementara menunggu timbang tara (OS No 12 untuk penggantungan). HCJ juga tidak salah dengan nyata dalam memberikan kebenaran kepada Tan Chong untuk menguatkuasakan AD (OS No 13 untuk penguatkuasaan). Oleh itu, tiada kekhilafan yang memerlukan campur tangan rayuan (lihat perenggan 49–50).]

Cases referred to

Kayangan Kemas Sdn Bhd v TMT Solutions Sdn Bhd [2019] MLJU 1277, HC (refd)

MRCB Builders Sdn Bhd v Wazam Ventures Sdn Bhd and another case [2020] MLJU 208; [2020] 5 MLRH 138, HC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

Panzana Enterprise Sdn Bhd v MKP Builders Sdn Bhd and another case [2021] MLJU 386, HC (refd)

Pinnacle Supreme Sdn Bhd v DSG Projects Malaysia Sdn Bhd [2021] MLJU 961, HC (refd)

View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22, FC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 8, 8(1), (2), 9(1), 12(1), (2)(a), (2)(b), (3), 15, 16, 16(3), 17, 17(1), (2), (3), 21, 24, 27, 27(1), 28

Appeal from: *Granstep Development Sdn Bhd v Tan Chong Heng Construction Sdn Bhd and other cases* [2021] MLJU 2473 (High Court, Shah Alam)

Richard Kok (Richard Kok) for the appellant.

Ganesalingam Vijayaratnam (Ganesalingam Vijayaratnam & Aishah Jothilingam) for the respondent.

Ahmad Zaidi Ibrahim JCA:

INTRODUCTION

[1] The parties herein shall be referred to as follows, the appellant (Granstep Development Sdn Bhd) as Granstep and the respondent (Tan Chong Heng Construction Sdn Bhd) as Tan Chong.

[2] The three appeals herein were all filed by Granstep. The appeals emanated from the same Adjudication proceeding that was commenced by Tan Chong against Granstep under the Construction Industry Payment and

Adjudication Act 2012 ('the CIPAA'). On 1 April 2021 the adjudicator allowed Tan Chong's claim and on even date, duly issued the adjudication award ('AD').

[3] Flowing from the said AD, three separate applications were filed in the Shah Alam High Court vide three separate originating summons (OS) namely:

(a) OS No BA-24C-11–04 of 2021 ('OS No 11') filed by Granstep to set aside the AD under s 15 of the CIPAA;

(b) OS No BA-24C-12–04 of 2021 ('OS No 12') also filed Granstep to stay the enforcement of the AD pending arbitration between the parties pursuant to ss 16 and 27 of the CIPAA 2012; and

(c) OS No BA-24C-13–04 of 2021 ('OS No 13') filed by Tan Chong to enforce the AD under s 24 of CIPAA.

DECISION OF THE HIGH COURT

[4] The learned High Court judge ('HCJ') heard the three OS at one go and having heard them, on 6 August 2021 the learned HCJ handed down the following rulings/decisions:

(a) OS No 11 (setting aside) is dismissed with costs;

(b) OS No 12 (stay pending arbitration) is also dismissed with costs; and

(c) OS No 13 (enforcement of AD) is allowed with costs.

[5] Dissatisfied, Granstep appealed to the Court of Appeal ('COA') against the abovesaid orders vide three separate appeals namely:

(a) Appeal No 1597–08 of 2021 ('Appeal 1579') for OS No 11;

(b) Appeal No 1598–08 of 2021 ('Appeal 1598') for OS No 12; and

(c) Appeal No 1599–08 of 2021 ('Appeal 1599') for OS No 13.

[6] The learned HCJ prepared one common grounds of judgment ('GOJ') for the three appeals as per encl 16 (*rekod rayuan tambahan*).

OUR DECISION

[7] We heard the three appeals together as they are inter-related and pertained to the same decision of the Shah Alam High Court dated 6 August 2021 and having appraised the appeal records, including the GOJ and having considered both the written and oral submissions by the learned counsels, we unanimously found no merit in all the three appeals. Hence, the three appeals

were dismissed with costs of RM20,000 subject to allocator. The decisions of the learned HCJ were accordingly affirmed.

[8] We dismissed the three appeals on the following reasons/grounds.

CHRONOLOGY OF EVENTS AND FACTUAL BACKGROUND

[9] The events and facts leading to the adjudication proceeding are as narrated by the HCJ at paras 3–33 GOJ. We would not reproduce *in extenso*, word for word the abovementioned 30 paragraphs herein. However, for the appeals herein, the relevant material facts and events in brief, are as follows:

(a) Granstep appointed Tan Chong as its contractor for a housing project vide 'Letter of Award' dated 8 February 2018;

(b) Granstep terminated the contract/agreement on 29 November 2019;

(c) Tan Chong submitted its payment claim ('PC') No 14 on 13 December 2019;

(d) the architect did not issue any interim payment certificate for PC No 14;

(e) Tan Chong then served its PC on Granstep on 27 February 2020 ('first PC') under CIPAA;

(f) Granstep served its payment response ('PR') on Tan Chong on 11 March 2020 for the first PC;

The first adjudication:

(g) on 13 March 2020, Tan Chong served a 'Notice of Adjudication' ('first NA') on Granstep;

(h) on 12 May 2020, Tan Chong sent Form 3A, Form 5 and 2 cheques to the Director of AIAC;

(i) vide letter dated 21 May 2020 from AIAC to Tan Chong, AIAC informed Tan Chong that due to the demise of its Director (Mr Vinayak Pradhan), an adjudicator would only be appointed for Tan Chong's claim by the new Director;

(j) vide letter dated 27 May 2020 Tan Chong replied to AIAC informing that it wished to proceed with its claim and would file a fresh Form 5;

The second adjudication:

(k) on 16 June 2020 Tan Chong served a PC dated 15 June 20202 ('second PC') on Granstep and Tan Chong informed Granstep that the second PC superseded the first PC. Tan Chong claimed for the sum of RM4.125m;

(l) Granstep disputed Tan Chong's claim and at the same time counterclaimed against Tan Chong vide PR dated 26 June 2020 ('second PR'). Granstep counterclaimed for the sum of RM14.558m;

(m) Tan Chong then vide letter dated 1 July 2020 issued notice of adjudication (NA) dated 1 July 2020 ('second NA') on Granstep, informing Granstep that the second NA superseded the first NA;

(n) on 16 July 2020, Tan Chong sent to AIAC's Director Form 3A (second Form 3A), Form 5 (second Form 5) and 2 cheques being the registration fee and appointment fee;

(o) on 4 December 2020, the AIAC's Director appointed the adjudicator to adjudicate the second PC; and

(p) Granstep objected against the adjudicator to arbitrate for want of jurisdiction. The adjudicator dismissed Granstep's objection and proceeded to adjudicate Tan Chong's claim and proceeded to deliver the AD whereby, Tan Chong's claim was allowed in the sum of RM2,104,964.44 and Granstep's counter claim was dismissed.

[10] Having laid down the material facts and events, we shall now deal with the three appeals.

[11] Before us, learned counsels for both sides basically replicated their respective stand and submissions before the HCJ.

APPEAL NO 1597 (OS NO 11) — TO SET ASIDE THE AD

[12] In our view Appeal No 1597 (OS No 11 — to set aside the AD), is the main appeal which would effectively also determine Appeal No 1599 (OS No 13).

[13] In respect of the OS No 11 (setting aside application), the learned HCJ, dismissed the said application with costs, after having dismissed Granstep's jurisdictional challenge and having ruled that the adjudicator has jurisdiction and had not exceeded his jurisdiction to adjudicate the second PC.

[14] Counsel for Granstep argued that the learned HCJ was in error in not setting aside the AD as the adjudicator had committed a breach of natural justice and/or had exceeded his jurisdiction and/or completely lacked jurisdiction to adjudicate the second PC because:

(a) Tan Chong had not withdrawn the first adjudication pursuant to s 17(1) of CIPAA;

(b) the second adjudication had not been registered by the AIAC under r 2 of the AIAC Adjudication Rules and Procedures ('ARP'); and

(c) the second PC cannot supersede the first PC.

Non-withdrawal of the first adjudication pursuant to s 17 of the CIPAA

[15] Counsel for Granstep referred to s 17(3) of the CIPAA which stipulates:

> 17(3) The claimant who has withdrawn the adjudication claim is free to recommence adjudication on the same subject matter by serving a new notice of adjudication in accordance with section 8.

[16] Based on the abovesaid provision counsel contended that the learned HCJ was in error in not holding that Tan Chong must withdraw the first adjudication proceeding under s 17 of the CIPAA if it chose not to proceed with the claim and not simply abandon the first adjudication. This was because the provision allows the claimant to withdraw the first adjudication and recommence a new one.

[17] Counsel relied on s 8(1) of the CIPAA to say that an adjudication proceeding can be instituted by way of a NA without the appointment of an adjudicator. Section 8 of the CIPAA states as follows:

> 8(1) A claimant may initiate adjudication proceedings by serving a written notice of adjudication containing the nature and description of the dispute and the remedy sought together with any supporting document on the respondent.
>
> (2) Upon receipt by the respondent of the notice of adjudication, an adjudicator shall be appointed in the manner described in section 21.
>
> ...

[18] Conversely, learned counsel for Tan Chong submitted that an adjudication cannot be commenced without the appointment of an adjudicator.

[19] The learned HCJ disagreed with the submission by Granstep aforesaid. At para [50] GOJ, His Lordship was of the view that the adjudicator has 'jurisdiction' to adjudicate the second PC pursuant to s 5 read with s 27(1) of the CIPAA, and at para [52] His Lordship opined that adjudication proceedings can only be commenced upon the appointment of an adjudicator unders 21 of CIPAA and not before that. His Lordship found Granstep's abovesaid contention to be in contrast/inconsistent with the wording in ss 8(2), 9(1), 12(1), (2)(a), (b) and (3) of the CIPAA.

[20] His Lordship referred to *MRCB Builders Sdn Bhd v Wazam Ventures Sdn*

Bhd and another case [2020] MLJU 208; [2020] 5 MLRH 138, wherein it was held that s 12(3) of the CIPAA which states that any non-compliance with s 12(2)(a) by an adjudicator (pertaining to the strict timeline/deadline for the delivery of the AD) will render the adjudication decision void. The learned HCJ opined that the strict time periods stated in s 12(2)(a) or (b) of the CIPAA can only take effect upon the appointment of an adjudicator and not before. Hence, without the appointment of an adjudicator, the learned HCJ ruled that no adjudication proceedings can be commenced.

[21] We do not agree with the submission by counsel for Granstep that the learned HCJ had gone against the wording and object of CIPAA. We concurred with the learned HCJ's foregoing interpretation of the said provisions of CIPAA. Nowhere in s 8(1) of the CIPAA states that adjudication proceedings shall commence merely upon the service of a NA by a claimant on the respondent (without the appointment of an adjudicator). Premised on that, we agreed that when an adjudicator has not been appointed, an adjudication has not been instituted, notwithstanding that the claimant's PC (on the respondent) and NA (on AIAC and the respondent) have been served.

[22] Consequently, we agreed with the learned HCJ that to describe the first PC, first PR and first NA as the first adjudication is misconceived. We agreed that in the circumstances, no adjudication proceedings had been instituted with regard to the first PC, first PR and first NA (as an adjudicator had not been appointed for the first PC and first NA).

The second adjudication had not been registered by the AIAC under r 2 ARP

[23] Next, counsel for Granstep submitted that as the second adjudication had not been registered by the AIAC, the adjudicator had no jurisdiction to adjudicate the second PC.

[24] The learned HCJ opined that ARP has no legal effect as it is not a legislation made under CIPAA. CIPAA does not confer any power on AIAC to make regulations or subsidiary legislation. As such Granstep cannot rely on ARP to challenge the jurisdiction of the adjudicator to hear the arbitration.

[25] We are also in agreement with the learned HCJ on this point.

The second PC cannot supersede the first PC

[26] Last but not least, we move on to Granstep's point that Tan Chong was required by s 17 of the CIPAA to withdraw the first Adjudication before commencing the second Adjudication. According to counsel, the second PC cannot supersede the first PC. Counsel referred to s 17 of the CIPAA.

[27] Before the HCJ, counsel submitted that as the first AP was not withdrawn in accordance with s 17(1) of the CIPAA, any adjudicator appointed for the second AP under the second Form 3 dated 1 July 2020 cannot assume jurisdiction under CIPAA in view that there being a pre-existing first AP.

[28] The learned HCJ rejected counsel's aforesaid submission and at paras [69] and [70] GOJ held as follows:

> [69] I am not able to accede to the above contention because a PC is not a 'pleading' within the meaning of O 18 RC. I refer to the following judgment in Integral Acres, at [24] to [27] ...
>
> [70] As explained in Integral Acres, TCHC's second PC could supersede or revise the first PC. Hence, the adjudicator did not exceed his jurisdiction as understood in s 15(d) CIPAA when he adjudicated TCHC's Claim based on the second PC. Moreover, GD had not been prejudiced by the second PC because GD had responded to the second PC by way of the second PR.

[29] The learned HCJ disagreed and instead ruled that based on s 17(1) and (2) of the CIPAA, a claimant can only withdraw the adjudication proceedings after the appointment of an adjudicator by serving a notice of withdrawal in writing on the respondent and the adjudicator. Section 17(2) states that the claimant 'shall' bear the costs arising out of the withdrawal of the adjudication proceedings unless the adjudicator orders otherwise, which implies that the costs for the withdrawal can only be decided by an adjudicator. Accordingly, if an adjudicator has not been appointed, there is no requirement for a claimant to withdraw an adjudication because there is no adjudicator to decide on who should bear the costs for the withdrawal and its amount.

[30] We noted that in dismissing OS No 11, the learned HCJ acknowledged the restrictive provision of s 15 of the CIPAA, under which Granstep's application to set aside of the AD was premised on wherein, as per in paras [84] and [85] GOJ the learned HCJ made the following ruling:

> [84] The nature of the court's power under s 15 CIPAA has been explained in *Alpha Galaxy Sdn Bhd v Euro Destar (M) Sdn Bhd* [2021] MLJU 767; [2021] AMEJ 614, at [26], as follows:
>
> > [26] This case serves as a reminder of the nature of the court's power in deciding anapplication under s 15 of the CIPAA (setting aside application). I am of the following view regarding a setting aside application:
> >
> > (1) an adjudication decision is provisional under s 13(a) to (c) CIPAA. The High Court may set aside an adjudication decision —
> >
> > (a) if the adjudicator has no jurisdiction to adjudicate the matter — please refer to *Uzma Engineering Sdn Bhd v Khan Co Ltd* [2020] MLJU 1272, at [22]; and/or

(b) there is proof of any one or more of the circumstances stipulated in s 15(a) to (d) read with s 13(a) CIPAA; and

(2) a setting aside application is not an appeal to the High Court against an adjudication decision. Nor is a setting aside application a judicial review of an adjudication decision. Accordingly, the court in a setting aside application cannot review the merits of an adjudication decision and cannot set aside an adjudication decision merely on any one or more of the following grounds:

(a) an error of law has been committed by an adjudicator (unless the adjudicator has answered a 'wrong' question of law which does not arise from the dispute to be adjudicated upon) — please see the judgment of Lee Swee Seng J (as he then was) in the High Court case of *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd & another case* [2016] 5 CLJ 882, at [71];

(b) an adjudicator has interpreted erroneously a provision in the construction contract — *Econpile*, at [67];

(c) an adjudicator has misconstrued relevant documents;

(d) relevant evidence has been wrongly excluded by an adjudicator;

(e) an adjudicator has erroneously admitted irrelevant evidence;

(f) an adjudicator has failed to attach due weight to relevant evidence, oral or documentary;

(g) undue weight has been given by an adjudicator to any piece of evidence;

(h) an adjudicator has assessed erroneously the evidence presented to the adjudicator;

(i) a plain error regarding a finding of fact has been made by an adjudicator;

(j) an adjudicator has omitted to make a finding of fact which can be adequately supported by evidence;

(k) an erroneous finding of mixed fact and law has been arrived at by an adjudicator — please refer to Lee Swee Seng J's decision in the High Court in *Syarikat Bina Darul Aman Bhd & Anor v Government of Malaysia* [2017] MLJU 673; [2017] 4 AMR 477, at [60];

(l) an adjudicator has made a wrong inference from the evidence;

(m) an adjudicator has erroneously omitted to make the right inference from the evidence;

(n) errors have been made in the reasons given by an adjudicator in support of the adjudication decision; and

(o) an adjudicator has erred in his or her reasoning with regard to the adjudication decision.

The above errors and omission by an adjudicator can be remedied by an arbitration or litigation (whichever the case may be) regarding the dispute in question [as provided in s 13(c) CIPAA) *Econpile*, at [67].

A [85] Premised on Alpha Galaxy, I cannot set aside the AD pursuant to s 15 CIPAA based on any error or omission by the adjudicator regarding the merits of the adjudication (alleged adjudicator's error/omission (merits)(. Furthermore, by reason of s 13(c) CIPAA, any alleged adjudicator's error/omission (merits), including the adjudicator's rejection of GD's counterclaim (LO) on Section 1 B (Project) and Section 3 (Project), can and should be corrected at the arbitration.

[31] Having appraised the reasonings of the learned HJC, we agreed with His Lordship's finding and ruling that the adjudication proceedings had not been commenced by way of the first PC and first AC and that Tan Chong was C not required by CIPAA, in particular s 17(1) and (2) to withdraw the first adjudication before commencing the second adjudication.

[32] Additionally and in closing, having agreed with the HCJ's reasoning and ruling in respect of Appeal No 1597, we noted that Granstep had not been D prejudiced in any manner by Tan Chong's non-withdraw of the first adjudication because as found by the HCJ, Granstep had served the second PR and AR and it bears mention that the adjudicator had dismissed Granstep's first Jurisdictional Objection. On the foregoing reasons we find no merit in Appeal E No 1597. Accordingly, we are constrained to dismissed the appeal with costs.

APPEAL NO 1599 FOR OS NO 13 — ENFORCEMENT OF THE AD

[33] Pertaining to the enforcement of the AD, counsel for Granstep F submitted that the learned HCJ was in error in allowing a portion of Tan Chong's application for enforcement of the AD. Counsel submitted that the whole of the application (OS No 13) should be dismissed as there are clear and unequivocal errors in the AD. Counsel repeated Granstep's grounds for the application to set aside the AD, whereby counsel argued that the adjudicator G was wrong in proceeding to adjudicate Tan Chong's claim because:

(a) Tan Chong had not withdrawn the first adjudication;

(b) the second adjudication had not been registered by the AIAC; and

H (c) the second PC cannot supersede the first PC.

[34] The learned HCJ after considering the grounds for objection abovementioned, found them to be devoid of any merit. As mentioned earlier, for Appeal No 1599, counsel basically repeated Granstep's submission for the I setting aside (OS No 11 and Appeal No 1597). For Appeal No 1597 (for OS No 11), we were not persuaded by the submissions by Granstep, having found no merit in the appeal.

[35] Having found Granstep's argument and submission for Appeal 1597 to be without merit, similarly, for this Appeal No 1599 (for OS No 13), we are constrained to find the same. Therefore Appeal No 1599 is also accordingly dismissed with costs.

APPEAL NO 1598 (OS NO 12 - FOR STAY OF ENFORCEMENT)

[36] Vide OS No 12, Granstep applied to stay the enforcement of the AD pending the disposal of the setting aside application or pending the final determination of the arbitration between the parties. The application was made pursuant to s 16(3) of CIPAA which reads:

> 16 Stay of adjudication decision
>
> (1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:
>
> (a) an application to set aside the adjudication decision under section 15 has been made; or
>
> (b) the subject matter of the adjudication decision is pending final determination by arbitration or the court.
>
> (2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

[37] The learned HCJ dismissed Granstep's application abovesaid. Counsel submitted that the learned HCJ has erred. Counsel submitted that stay should be granted or in the alternative, a conditional stay requiring Granstep to pay the adjudicated sum into a stakeholding account pending the disposal of the arbitration proceedings. For conditional stay counsel referred to the case of *Panzana Enterprise Sdn Bhd v MKP Builders Sdn Bhd and another case* [2021] MLJU 386.

[38] Learned counsel submitted that the HCJ was in error for failing to adequately consider the following namely:

(a) Granstep's jurisdictional challenges; and

(b) Tan Chong's financial standing.

*Ground (a) — Granstep's jurisdictional challeng*e

[39] For ground (a) learned counsel replicated Granstep's jurisdictional challenge, based the same grounds when applying to set aside the AD (OS No 11). Counsel submitted that there are clear and unequivocal errors in the AD because the adjudicator had no jurisdiction and therefore in the circumstances it would be just to grant a stay.

[40] It bears repeating that the learned HCJ was not convinced by Granstep's jurisdictional challenge. As earlier stated by us in the earlier part of our judgment herein, we find no error in the ruling by His Lordship on the issue. We find no reason to depart from our said finding in respect of Granstep's jurisdictional challenge for OS No 12 (Appeal No 1598). Thus, we find no merit in ground (a).

Ground (b) — Tan Chong's financial standing

[41] For ground (b) learned counsel contended that there is a high probability that Tan Chong would be unable to repay Granstep at the end of the proceedings, in the event the outcome favours Granstep. Counsel relied on the fact that Tan Chong vide Originating Summons No NA-24NCC-6–03 of 2020, had applied for judicial management, based on Tan Chong's inability to pay its trade creditors and banks. Even though on 8 March 2021, the court dismissed the judicial management application, counsel contended that RHB Bank Bhd and all the other creditors of Tan Chong are free to initiate execution proceedings against Tan Chong (it bears mention that Tan Chong was subsequently wound up on 28 July 2021 by the Seremban High Court in Companies Winding-Up No NA-28NCC-10–04 of 2021, upon the petition of RHB Bank Bhd.)

[42] Counsel submitted that the learned HCJ acknowledged Tan Chong's commercial insolvency but declined to stay the AD despite the overwhelming risk that Tan Chong may not be able to pay back the sum sought to be enforced by the Granstep or the sum allowed to be enforced by the learned HCJ in the event that the arbitration outcome is in favour of the Granstep.

[43] Counsel further averred that even though the learned HCJ took into consideration the judgment obtained by Granstep against Tan Chong, the sum allowed to be enforced via the AD remains large, which counsel contended, Tan Chong may not be able to pay back. Counsel relied on the High Court cases of *Pinnacle Supreme Sdn Bhd v DSG Projects Malaysia Sdn Bhd* [2021] MLJU 961 and *Kayangan Kemas Sdn Bhd v TMT Solutions Sdn Bhd* [2019] MLJU 1277 and *Panzana Enterprise Sdn Bhd v MKP Builders Sdn Bhd and another case* [2021] MLJU 386.

[44] Concerning ground (b), namely, Tan Chong's financial capability, we referred to the Federal Court case *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22, wherein, on the applicability of s 16 of the CIPAA, Zulkefli Ahmad Makinudin PCA states the following:

> [84] The High Court and the Court of Appeal in the present case took the view that no stay was available unless the appellant could show that the respondent was unable to repay the adjudication sum. With respect *we are of the view that the correct*

approach for the High Court under s 16 of CIPAA would be to evaluate each case on its merits without the fetter of a pre-determined test not found in the section itself namely the financial capacity of the contractor to repay. It could be a factor but not the only factor. (Emphasis added.)

[45] In our view having appraised the GOJ, for OS No 12, the learned HCJ had duly followed the principle laid out in *View Esteem* above mentioned. As an appellate Court, we are minded by the guidance and reminder by the Federal Court in case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 where it held as follows:

As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[46] Section 16 of the CIPAA allows some degree of flexibility to the courts to slay an adjudication award where there are clear errors, or to meet justice of the individual case. As found by the learned HCJ, with which we are in concurrence, there was no error on the part of the adjudicator in proceeding and thereafter in determining the second adjudication and premised on His Lordship's said findings aforesaid, found that Tan Chong had established all the requirements under s 28 of the CIPPA and based on that allowed enforcement of the AD. Granstep failed to show any error on the part of the adjudicator and/or the learned HCJ.

[47] Thus, we would also dismiss Granstep's appeal for Appeal No 12 and accordingly, we affirmed the decision of the HC.

OVERALL CONCLUSION

[48] For the three appeals before us, by and large counsels had repeated and refreshed their respective submissions made before the High Court for OS Nos 11, 12 and 13. Having considered the reasonings of the learned HCJ in dismissing OS Nos 11 and 12 and in allowing OS No 13, we are in concurrence with the said findings and decision of the HCJ.

[49] We find that His Lordship was not plainly wrong in his finding. We could not find any error to warrant our intervention.

[50] All in all, we are of the considered view, that Granstep failed to show that the learned HCJ was plainly wrong, on the law and the facts in dismissing

Granstep's setting aside application (OS No 11) and also in not granting a stay of enforcement of the same, pending arbitration (OS No 12). The learned HCJ was also not plainly wrong in allowing leave to Tan Chong to enforce the AD (OS No 13).

[51] Based on the aforesaid reasons, we are constrained to dismiss all the three appeals. Hence Appeals Nos 11, 12, and 13 are respectively dismissed with costs of RM20,000 to Tan Chong, subject to allocator.

Appeals dismissed.

Reported by K Selvaraju